BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHARON MULQUEEN Claimant VS. **MCCRITE PLAZA RETIREMENT** Respondent AND **BUSINESS INSURANCE CO.** Insurance Carrier	)))))))))))	Docket No. **236,288**

ORDER

Claimant appealed Administrative Law Judge Bryce D. Benedict's Award dated September 14, 2000. The Board heard oral argument on February 20, 2001.

APPEARANCES

Claimant appeared by her attorney, Roger Fincher. Respondent and insurance carrier appeared by their attorney, Ronald Laskowski.

RECORD & STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The claimant filed an application for review and raised the issues of whether the claimant sustained an accidental injury arising out of and in the course of her employment with the respondent and, if the claim is compensable, the nature and extent of disability.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

The claimant was employed by the respondent as director of nursing. The job was an administrative position but also required direct patient care. As the person in charge of the nursing staff, the claimant was responsible for making sure that anybody hurt on the job filled out an incident report. Moreover, the claimant prepared the policy and procedure manual for the nursing section regarding the procedure for reporting work-related injuries. The procedure developed by the claimant specified that treatment for any work-related incident was to be provided by the employer's designated physician.

On July 6, 1997, the claimant was injured in a non work-related automobile accident while visiting her parents in Oklahoma. The claimant sustained injuries to her left shoulder, back, side and chest. The claimant received emergency room treatment but was able to return to work for the respondent on July 8, 1997. The claimant pursued a civil action against the driver of the other vehicle involved in the car accident and ultimately settled that claim for an amount in excess of $40,000.

Although claimant returned to work for the respondent following the car accident, she continued to receive medical treatment with Drs. Boehr and Vosburgh for her injuries from the car accident. On June 1, 1998, following an extended course of conservative treatment, Dr. Vosburgh performed an arthroscopic decompression acromioplasty on the claimant's left shoulder.

The claimant testified that on October 29, 1997, a patient falling out of bed had pulled claimant's arm. In addition, the claimant detailed other alleged specific incidents where she had caught patients and injured or aggravated her shoulder. These additional alleged work-related incidents occurred in November and December 1997 and February, March and May 1998.

During the course of treatment for the injuries incurred in the automobile accident, the claimant advised the respondent's administrator that she was receiving treatment and notified him of the doctor's restrictions imposed during her conservative treatment. The administrator testified that he was aware of the treatment claimant was receiving for the car accident but that the claimant never mentioned any work-related injury. The claimant admitted that in discussions she simply referred to her injury and did not specifically mention any work-related injury.

During this same time frame there were communication problems developing between the claimant and the administration. For example, the claimant had written a letter dated April 14, 1998, expressing her displeasure with an administrator's denial of her request for some time off. Thereafter, the claimant sent the respondent a letter dated

May 14, 1998, which noted that as of that date the claimant would be unable to work due to surgery and her keys and beeper would be turned in to the office. This letter was followed by a letter dated May 20, 1998, which requested the respondent provide her any papers she needed to sign for medical leave for her disability. However, the respondent had interpreted the claimant's May 14th letter as a voluntary termination and had sent the claimant a letter detailing her Cobra right to continue her health insurance coverage.

Although it was controverted whether it was the claimant's intention to quit when she sent her May 14, 1998 letter, it was uncontroverted that she did not work for the respondent after that date. The record further reveals that claimant developed a great deal of animosity towards the respondent as a result of her termination.

The Administrative Law Judge's award adopted by reference the statement of the record, issues and conclusions of the respondent's submission brief except as otherwise noted in the award. The significant findings were that claimant failed to meet her burden of proof to establish that she suffered a compensable work-related injury nor did she provide timely notice of accident.

The Administrative Law Judge determined that the claimant failed to prove that she sustained an accidental injury arising out of and in the course of her employment. The theory advanced by the claimant was that in the course of performing her work activities for the respondent she had aggravated the shoulder that had been injured in the automobile accident.

The following colloquy occurred during Dr. Hendler's deposition:

> Q. And, Doctor, did you review and formulate an opinion as to whether Ms. Mulqueen had suffered any increased impairment or any impairment at all as a consequence of work-related injuries or aggravations that she claimed she incurred while working for McCrite Plaza?
>
> A. Yes, sir.
>
> Q. (By Mr. Laskowski) And what was your opinion, Doctor?
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> A. My opinion was that on -- there was no impairment, additional or otherwise, that could be related to the injuries attributed to work.
>
> Q. And what was the basis of your opinion in that regard, Doctor, or the rationale?

> A. The rationale was the lack of medical documentation, as well as that the final outcome with respect to the shoulder is no different from what I would have expected based on the auto accident injury alone."[1]

Doctor Voth, a psychiatrist, testified that although the claimant suffered from temporary depression following her shoulder surgery it was not due to her alleged work injuries. Moreover, the doctor concluded that the claimant did not suffer from any permanent impairment as a consequence of a psychiatric disorder.

The Board is not unmindful of Dr. Rope's opinion which apportioned a percentage of the claimant's functional impairment to aggravation of her preexisting shoulder condition caused by her work activities. However, the doctor admitted his opinion was based solely upon the claimant's history of a work-related incident in October 1997. As previously noted, there was never a report of such an incident to the respondent and the doctor was unable to find corroborating medical documentation of any such injury. In addition, Dr. Bickelhaupt's opinion regarding the claimant's psychological impairment of function is discounted because he was also given a history of work-related injury that has not been corroborated by contemporaneous medical reports. Most significantly, his opinion regarding permanent impairment is in stark contrast with the claimant's testimony at regular hearing where she admitted she was no longer under treatment nor on any anti-depressant medication.

The preponderance of the credible evidence supports the Administrative Law Judge's finding that the claimant failed to sustain her burden of proof to establish that she sustained an accident arising out of and in the course of her employment. The Administrative Law Judge's decision should be and is hereby affirmed.

Additionally, the respondent denied that the claimant provided notice of the specific work-related incidents detailed by the claimant. K.S.A. 44-520 requires that a claimant provide the employer with notice of the accident within ten days after the accident.

Although the claimant alleged she advised the respondent of the incidents that had occurred during the course of her employment, the administrator denied that claimant had ever alleged a work-related incident. A review of the incident reports during this time span also failed to reveal any incident reports filed by the claimant for any of the alleged accidents. This is especially significant when it is noted that there was an incident report filed by the claimant detailing an accident that occurred in 1996. Moreover, the claimant admitted that she just referred to her "injury" when discussing her problems.

The claimant had a more in-depth understanding of the notice requirement for reporting work-related accidents than the typical employee because she personally developed the protocol for reporting such incidents.

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[1] Deposition of Steven L. Hendler, M.D., dated August 15, 2000, p. 16.

Dr. Vosburgh's medical records are devoid of any mention of a work-related incident or aggravation. The claimant further admitted that, although she was aware that the employer selected the treating physician for work-related injuries, she had never requested that respondent provide her with treatment. It is difficult to reconcile the claimant's thorough understanding of the protocol for filling out incident reports and receiving treatment from the respondent's designated physician with her failure to follow the procedure with her own allegations of work-related incidents. It was not until after the claimant was terminated that she notified the respondent that she was alleging work-related aggravations to her shoulder condition.

The preponderance of the credible evidence supports the additional finding by the Administrative Law Judge that claimant failed to give timely notice of her specific alleged work-related incidents that aggravated her preexisting shoulder condition.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated September 14, 2000, is hereby affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2001.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

pc: Roger Fincher, Attorney, Topeka, KS
Ronald Laskowski, Attorney, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Workers Compensation Director